UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ASCENSION HEALTH ALLIANCE, a Missouri non-profit corporation, Plaintiff, v. ASCENSION INSURANCE, INC., Defendant.	))))))))))	No. 4:15-cv-00283-CDP

ASCENSION HEALTH ALLIANCE'S OPPOSITION TO MOTION TO TRANSFER VENUE

Plaintiff, Ascension Health Alliance ("Plaintiff" or "Ascension"), respectfully opposes the motion by Defendant Ascension Insurance, Inc. ("Defendant" or "AI") to transfer this action to the United States District Court for the Northern District of California.

I. INTRODUCTION

The incorrect premise of AI's motion to transfer is that AI has no contacts with this State or this District and has its roots in California. To the contrary, although nowhere mentioned in its motion, AI was for most of its existence headquartered in Kansas City, Missouri and then, Kansas City, Kansas until 2014. As recently as 2012, it filed one of the trademark applications at issue in this action claiming 2345 Grand Blvd., Kansas City, Missouri 64108 as its principal address. The following year, it claimed as its principal address (in yet another trademark application) 9225 Indian Creek Pkwy., Overland Park, Kansas 66210. It continued to claim the latter Kansas City address through 2014 in a related administrative proceeding between the parties in the Trademark Trial and Appeal Board[1] (described more fully below), in which it identified at least six key witness (nowhere even mentioned in this motion) who are still based there. (Those same disclosures also gave only one location for its relevant documents: not

[1] *Ascension Health Alliance v. Ascension Insurance, Inc.*, Cancellation No. 92058897.

California, but the offices of its counsel at Polsinelli in Denver, CO.) It is not clear when AI moved some of its offices to California or what offices remain in Kansas City (because AI is conspicuously silent on these issues), but its contention that none of the operative facts in this litigation occurred in this District is plainly false.

Nor does AI's motion give any weight to the normal presumption favoring the plaintiff's choice of forum, much less the fact that Ascension has no relevant presence in California. Here, Ascension's choice of forum is entitled to deference because the company and its predecessors have always been based in Missouri (as was AI until very recently). Plaintiff has thus easily identified seven of its own potential witnesses residing in this District. AI, by contrast, identifies only one officer and one third party witness in California who, it says, might be inconvenienced by litigating in this District. It nowhere even mentions a half-dozen additional key witnesses (including several former key executives) identified by AI in the TTAB proceeding who still live here despite the company's apparent recent move west.

Although the law is clear that in trademark litigation the location of the intellectual property is essential in any transfer motion, AI never addresses this principle in its motion. To establish the scope of its trademark rights, Ascension thus will need to present proof of the reputation it has developed in its name and mark ASCENSION over the past 16 years, which in turn will require use of proof (testimonial and documentary) based in this jurisdiction. Likewise, AI also developed its accused trademark when it was still residing in this State (as confirmed by the fact that all of its subject trademark applications for the name "Ascension" claim a Kansas City, Missouri address, but for one Kansas City, Kansas application). (Moskin Decl., Exs. B and C).

Finally, almost six months after this action was commenced (on February 12, 2015), and notwithstanding that some of the delay was to facilitate settlement discussions, it does not serve the interests of justice to uproot this case and make the parties start over in a new forum.

II. FACTUAL BACKGROUND

Founded in 1999 as a successor to several predecessor companies, Ascension renders core services that span the range of health care from spiritually centered hospitals, clinics, nursing homes and acute care facilities to providing insurance coverage services to administering health awareness grant projects for the poor and more. Ascension is the largest Catholic non-profit healthcare system in the United States and the third largest healthcare system overall. Headquartered in St. Louis, it operates 114 wholly-owned and 17 additional jointly owned hospitals in 24 states and the District of Columbia, and employs more than 150,000 associates serving in more than 1,900 locations. Ascension has no offices and operates no hospitals in California. (Ragone Decl. ¶¶ 6.)

Many of the trademarks Ascension uses for its health care and insurance services are registered in the United States Patent and Trademark Office ("USPTO"), including:

- ASCENSION HEALTH & Design, Reg. No. 2,478,534;
- ASCENSION HEALTH, Reg. No. 4,069,046;
- CERTITUDE BY ASCENSION HEALTH, Reg. No. 4,234,598;
- ASCENSION HEALTH SMARTHEALTH. Reg. No. 4,422,262; and
- ASCENSION HEALTH ALLIANCE, Reg. No. 4,664,062.

Ascension's records and witnesses concerning development of these marks and the growth of the goodwill in its marks all reside in this District. (Ragone Decl. ¶¶ 3, 4, 5; Ex. A.) The key witnesses, *each one of whom is located in or around St. Louis, Missouri*, include:

1. Sandra R. Boillot, Vice President Risk Management Ascension Risk Services, who can testify about Plaintiff's adoption and long use of its ASCENSION trademarks, and about marketing, sales, promotion and advertising of Plaintiff's services and products under its ASCENSION marks,
2. Eric Feinstein, Senior Vice President Total Rewards Ascension, who can testify about Plaintiff's adoption and use of its ASCENSION marks and about marketing, sales, promotion and advertising of Plaintiff's services and products under its ASCENSION marks.
3. Michael Kobernick, MD, Chief Medical Officer, SmartHealth Ascension, who can testify about Plaintiff's adoption and use of its ASCENSION trademarks, and the

marketing, sales, promotion and advertising of Plaintiff's services and products under its ASCENSION marks.

4. Paul Posey, President Ascension Risk Services, who can testify about Plaintiff's adoption and use by of its ASCENSION marks and the marketing, sales, promotion and advertising of Plaintiff's services and products under its ASCENSION marks.
5. Nick Ragone, Sr. Vice President & Chief Communications Officer Ascension, who can testify about marketing, advertising, promotion and sale of products and services under the name ASCENSION.
6. Janet Roth, Insurance Consultant Ascension Risk Services, who can testify about Plaintiff's adoption and use of its ASCENSION trademarks, and about the marketing, sales, promotion and advertising of Plaintiff's services and products under these ASCENSION marks.
7. Shari Shane VP, Communications Ascension, who can testify about Plaintiff's adoption and use its ASCENSION trademarks, and the historical and projected marketing, sales, promotion and advertising of Plaintiff's services and products under its ASCENSION marks.

AI's officer who picked the name, and who was identified by AI in the TTAB proceeding as having principal knowledge of the company's "adoption, registration and use of the ASCENSION and ASCENSION INSURANCE, INC. marks as reflected in the company's records as well as the Registrant's licensures, [and] the services offered by Registrant" is Leonard Kline. His address as of September 2014 was given as the company's Kansas City, Kansas headquarters. He currently works at Acuity Consulting Services in Kansas City, Missouri. (Moskin Decl., Ex. F). He is nowhere mentioned in AI's motion. At the time AI picked the name (and until very recently), AI was headquartered in Kansas City Missouri. Although no discovery has been conducted on the issue, AI presumably would have had direct knowledge of Ascension to the immediate east. Indeed, when Ascension first put AI on notice of its apparent infringement in 2009, and again in 2013, those warning letters were sent to AI's addresses in Kansas City, Missouri and Kansas. (Moskin Decl., Ex. A).

AI's Kansas City, Kansas address was also correctly cited by Ascension when, on March 21, 2014, it commenced administrative proceedings before the Trademark Trial and Appeal Board to cancel AI's registrations for the marks ASCENSION (U.S. Registration No. 3,608,718) and ASCENSION INSURANCE, INC. (U.S. Registration No. 3,595,725). In its

October 23, 2014 responses to Ascension's first set of interrogatories in the now-suspended administrative proceeding, AI identified several individuals still based nearby (but *nowhere mentioned in this motion*) with relevant knowledge beyond the two witnesses identified in its Initial Disclosures, including:

1. Leonard P. Kline, Jr., founder of AI and its CEO until 2012, who selected the name ASCENSION and has primary knowledge of its use and expansion of use of the name. (Moskin Decl., Ex. E) (Interrog. 1, 4.) Mr. Kline now works at Acuity Consulting Services in the Kansas City, Missouri area (Moskin Decl., Ex. F)
2. P. Stephen Harris, Executive Vice President and General Counsel of AI in 2009, when it received Ascension's first cease and desist letter. (Interrog. 5.) He currently has an address in Olathe, Kansas. (Moskin Decl., Ex. G)
3. Daniel Brookhart, Controller of AI, who helped prepare AI's discovery responses in the administrative proceeding. (Interrog. 18.) He currently has an address in Shawnee, Kansas. (Moskin Decl., Ex. H)
4. James Ingraham, outside counsel and former Executive Vice President, Secretary and General Counsel of AI, who also helped prepare AI's discovery responses in the administrative proceeding. (Interrog. 18.) He currently has an address in Lenexa, KS (Moskin Decl., Ex. I)
5. Anita Larson, Senior Counsel of AI, who also helped prepare AI's discovery responses in the administrative proceeding. (Interrog. 18.) She currently works for Metro Fibernet LLC in Lawrence, KS (Moskin Decl., Ex. J)
6. Kris Kappel, a partner at the law firm, Husch Blackwell, LLP, who helped clear the trademark. She continues to work at Husch Blackwell, LLP in Kansas City, MO (Moskin Decl., Ex. K). Her law firm also has an office in St. Louis, Missouri.

In the supporting declaration of Edward Nathan Page, AI identifies only one witness in California other than himself (a third party named Natalie Zenius) and none of these six individuals.

AI is not a local California business. It was a Missouri company and now operates nationally. Defendant's website shows that it now operates insurance brokerage agencies across the United States, including agencies in California, Georgia, Florida, Nevada, North Carolina, Arizona, Kansas and Utah. Among these is an office in Overland Park, Kansas. (Moskin Decl., Ex. L).

III. ARGUMENT

A motion for transfer of venue is governed by 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to another district court or division where it might have been brought." In considering a motion to change venue under § 1404(a), the Court must give great weight to the plaintiff's choice of venue. *CPC Logistics, Inc. v. Abbott Labs., Inc.,* 2013 U.S. Dist. LEXIS 113711, *6 (E.D. Mo. Aug. 12, 2013). "That choice should only be disturbed upon a clear showing that the balance of interests weighs in favor of the movant's choice of venue." *Id. (citing Anheuser-Busch, Inc. v. City Merchandise*, 176 F. Supp. 2d 951, 959 (E.D. Mo. 2001)). The statutory language of 28 U.S.C. § 1404(a) reveals three general factors that courts must consider : (1) the convenience of the parties, (2) the convenience of the witnesses, and (3) the interests of justice." *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 691 (8th Cir. 1997). More specifically, courts consider:

> 1) the convenience of the parties; 2) the convenience of non-party witnesses; 3) the availability of judicial process to compel testimony from hostile witnesses; 4) the governing law; 5) relative ease of access to sources of proof; 6) possibility of delay and prejudice if a transfer is granted; and 7) practical considerations of cost and efficiency.

CPC Logistics, 2013 U.S. Dist. LEXIS 113711, at *7 (quoting *Anheuser-Busch*, 176 F. Supp. 2d at 959*);* *CCA Global Partners, Inc. v. Yates Carpet, Inc*., 2006 U.S. Dist. LEXIS 26682, *3-5 (E.D. Mo. Apr. 19, 2006); *see also Terra Int'l, Inc. v. Mississippi Chem. Corp.,* 119 F.3d 688, 691 (8th Cir. 1997). "The convenience of the witnesses, however, is the primary, if not most important factor." *CPC Logistics*, 2013 U.S. Dist. LEXIS 113711, at *7 (quotation omitted) (citing *Anheuser-Busch*, 176 F. Supp. 2d at 959); *May Dept. Stores Co. v. Wilansky*, 900 F. Supp. 1154, 1165 (E.D. Mo. 1995). Furthermore, "unless the balance of interests is strongly in favor of the movant, the plaintiff's choice of forum should prevail." *Id.* (citation omitted). The balance of factors taken into account under § 1404(a) weighs strongly against transfer in this matter.

A. Ascension's Choice of Forum Warrants Great Deference

Great deference is owed the plaintiff's choice of forum. *Anheuser-Busch, Inc. v. City Merch.*, 176 F. Supp. 2d 951, 1022 (E.D. Mo. 2001); *Terra Int'l*, 119 F.3d at 695. This "presumption in favor of the plaintiff's choice of forum is given greater weight when [as here] the plaintiff is a resident of the forum in which suit is brought." *Waterway Gas & Wash Co. v. OneBeacon Am.Ins. Co.*, 4:09-CV-2121 (CEJ), 2010 WL 3724854 *2 (E.D. Mo. Sept. 16, 2010) (*citing Houk v.Kimberly–Clark Corp.,* 613 F.Supp. 923, 927 (W.D.Mo.1985)). This is particularly true when, as here, any economic injury caused by the defendant's conduct would be felt in the plaintiff's chosen forum. *Enter. Rent-A-Car Co. v. U-Haul Int'l, Inc.*, 327 F. Supp. 2d 1032, 1046-47 (E.D. Mo. 2004).

AI would have this Court give no deference to Ascension's choice of forum, one of many reasons the motion is deficient and should be denied. Likewise, the cases cited by AI (mostly from other jurisdictions) are inapposite.[2] Indeed, not only did Ascension pick this forum because Plaintiff is located here, it did so with the understanding that AI remained a neighbor in Kansas City. Hence, the Complaint alleges that AI's address was in Kansas City. (Complaint ¶ 2.)

[2] Of the few 8th Circuit cases cited, *In re Apple, Inc.*, 602 F.3d 909 (8th Cir. 2010), involved a Taiwanese company having no contact with the forum state (Arkansas) suing over allegedly abusive litigation pursued by Apple in Taiwan and Germany. Unlike this action, where all of Ascension's chief witnesses (not to mention several key present or former AI employees) still work or reside in (or adjoining) this State, neither party in *In re Apple* had any witnesses in the jurisdiction or relevant contacts with the forum. The 8th Circuit did agree that "[i]n general, federal courts give considerable deference to a plaintiff's choice of forum…" 602 F.3d at 919, citing *Terra, Int'l, Inc. v. Miss. Chem. Co.*, 119 F.3d 688, 695 (8th Cir. 1997), but not when the plaintiff is a foreign national having no contact with the state but merely engaging in forum shopping. That certainly is not a relevant consideration here. In *Terra, Int'l, Inc.*, the other 8th Circuit case cited by AI, the basis of the transfer motion was simply a forum selection clause in the parties' contract. The case has no bearing here where there is no such contract between the parties and no forum selection clause.

B. The Parties' Contacts With The Forum Favor This Court Retaining Venue

Ascension and its predecessors have always been headquartered in St. Louis, and this is where effectively all relevant evidence pertaining to the ASCENSION trademark can be found. Indeed, Ascension employs roughly 662 people in the St. Louis area (Ragone Decl. ¶ 3), and this case implicates the business activities and professional reputation of Ascension and its officers, directors, and employees. The forum where the owner of the intellectual property is located has a greater interest in adjudicating the intellectual property rights than the infringer's forum. *See, e.g., Anheuser-Busch,*., 176 F. Supp. 2d at 953 (noting that Missouri had a strong interest in providing a forum for a Missouri corporation to protect its intellectual property); *Quick Point, Inc. v. Excel Eng'G, Inc*., 2008 U.S. Dist. LEXIS 124201, *17-18 (E.D. Mo. Dec. 17, 2008) (recognizing that Missouri had "a substantial interest in protecting its residents and corporations from infringing products" and plaintiff had "a clear interest in protecting its own intellectual property" in the forum).[3]

Although AI contends that California is the locus of operative facts giving rise to this action, it has not been candid with this Court in concealing that it spent most of its existence headquartered in this state (or, briefly, in the adjoining State of Kansas). Many of its key witnesses are still in Missouri or nearby. And the conduct at the heart of this case, namely its selection of the name "Ascension" and development and use of the name, all occurred in this State. On this point, the cases cited by AI in support are inapposite.[4]

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[3] *Accord, Weather Underground, Inc. v. Navigation Catalyst Sys., Inc.*, 688 F. Supp. 2d 693, 702 (E.D. Mich. 2009); *Bissell Homecare, Inc. v. PRC Indus., Inc.*, No. 1:13-CV-1182, 2014 WL 3756131, at *15 (W.D. Mich. July 31, 2014); *see also Signal IP, Inc. v. Ford Motor Co*., No. 14-3106, 2014 U.S. Dist. LEXIS 139357, *14-15 (C.D. Cal. Sept. 25, 2014).

[4] In *Cosmetic Warriors Ltd. v. Abrahamson*, 723 F. Supp. 2d 1102 (D. Minn. 2010), plaintiff was a British corporation with a principal place of business in the United Kingdom. *Id*. at 1103, 1106. Although it had some presence in Minnesota, it did not identify any Minnesota employees as its witnesses nor assert that any relevant documents were located in Minnesota, nor did it argue that Minnesota would be more convenient than Texas. *Id.* at 1106. Similarly, in *AEC One Stop Group, Inc. v. CD Listening Bar, Inc.*, 326 F. Supp. 2d 525, 526-527 (S.D.N.Y. 2004), the chosen forum (New York) was not plaintiff's home state and neither party identified witnesses residing in New York. *Id.* at 529-31. Likewise, in *H.B. Sherman Mfg. Co. v. Rain Bird Nat'l Sales Corp.*, 979 F. Supp. 627,

Nor in its motion does AI explain which of the infringing activities have occurred in California and nowhere even mentions that the company was founded and existed for six years in Missouri before its apparent recent move (in 2014) to California. AI's services are distributed nationally, as evidenced by its own offices listed on its website (including in Overland Park, KS) and its numerous sales representatives around the country. Thus, any interest California may have in adjudicating this dispute is significantly diluted by the national scope of the infringement. *See e.g., Peregrine Semiconductor Corp. v. RF Micro Devices, Inc*., 2012 U.S. Dist. LEXIS 79912, *28-30 (S.D. Cal. June 8, 2012) (where the intellectual property was developed in one state, the accused products sold in another and manufactured primarily in a third, with witnesses and documents located in a fourth, the court held that the dispute was not a localized controversy and declined to transfer).

Although AI asserts that less than one percent (1%) of its allegedly infringing sales occurred in the Eastern District of Missouri (AI Brief at 8; Page Decl. at ¶ 11), it is hardly clear how this number is calculated given AI's failure ever to acknowledge that it was headquartered in this State for most of its existence. Even if that number is accurate for 2015, AI's mere admission of continuing sales in Missouri is itself adequate to support venue in this District. *See, e.g., Black & Decker (U.S.) v. Pro-Tech Power*, 26 F. Supp. 2d 834, 842 (E.D. Va. 1998) (venue based solely on sales to forum, even tenuous, is proper in trademark cases); *Exovir Inc. v. Mandel*, 1995 U.S. Dist. LEXIS 9677 *9 (S.D.N.Y. July 12, 1995) (a total of two sales of the allegedly-infringing product in the forum were sufficient to establish jurisdiction); *Hubbell Inc. v. Pass & Seymour, Inc.*, 883 F. Supp. 955 (S.D.N.Y. 1995) (same).

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629 (N.D. Ill. 1997), neither party had offices or facilities in the forum state (Illinois), and no single Illinois resident was identified as a potential witness. *Id.* at 629, 631. By contrast, Plaintiff's principal place of business is in St. Louis, Missouri, and it has identified a number of witnesses residing in this District who would testify in these proceedings.

Although AI claims it recently relocated to California, “mere [present] convenience of Defendant is not a sufficient basis to overcome the defendant’s burden under 28 U.S.C. § 1404 (a).” *Secure Energy, Inc. v. Coal Synthetics,* 2009 U.S. Dist. LEXIS 126806, *54 (E.D. Mo. June 8, 2009) (denying defendant’s motion to transfer); *Quick Point*,, 2008 U.S. Dist. LEXIS 124201, at *20 (“merely shifting the inconvenience from one side to the other … is not permissible justification for a change of venue”); *see also Caddy Prod’s, Inc. v. Am. Seating Co*., 2005 U.S. Dist. LEXIS 21871, at *2 (D. Minn. Sept. 28, 2005) (citations omitted) (“Thus, when the plaintiff resides in the chosen forum and the defendant resides in the proposed transferee forum, one party will unavoidably be inconvenienced whether or not the transfer is granted. In such a case, the plaintiff’s choice of forum will prevail.”). Thus, the present convenience of Defendant in its new home does not warrant transfer from this forum.

C. Access To Key Witnesses And Evidence Favors Retaining Jurisdiction

The convenience of the witnesses is a principal factor in the transfer analysis. *CPC Logistics*, 2013 U.S. Dist. LEXIS 113711 at *9. A party moving to transfer based on inconvenience to witnesses must provide information sufficient to allow the court to evaluate the actual convenience of witnesses. *Enter. Rent-A-Car Co. v. U-Haul Int’l, Inc.*, 327 F. Supp. 2d 1032, 1045 (E.D. Mo. 2004) (“it is the burden of the party seeking transfer to specify clearly the key witnesses to be called and indicate what their testimony will entail.”) (Citation omitted).

Additionally, the mere existence of specific out-of-district non-party witnesses whose testimony is required on specific topics is insufficient without a showing that “such witnesses cannot be compelled to appear for discovery, in a proper place . . . [or] that the testimony of any necessary witness cannot be adequately presented by deposition, either read into the record from a transcript, or in the form of a videotaped deposition played for a jury.” *Maritz Inc. v. C/Base, Inc.*, No. 4:06-CV-761 CAS, 2007 U.S. Dist. LEXIS 8678, *12 (E.D. Mo. Feb. 7, 2007) (quotations omitted). *Accord, Nordyne, Inc. v. Flick Distrib., LLC,* No. 4:09-CV-0055-TCM, 2009 U.S. Dist. LEXIS 44900, *5 (E.D. Mo. May 28, 2009).

AI has utterly failed to satisfy these crucial requirements. In AI's only supporting affidavit, its CFO, Mr. Page, identifies only one other witness and fails to describe even his own expected testimony. His affidavit merely states in a conclusory fashion that "Ascension Insurance witnesses with information on the marketing and sales of Ascension Insurance's products and services under the name 'Ascension' work in the Northern District of California and/or reside closely thereto." (Page, Dec. ¶ 4). These unsubstantiated and anonymous references do not justify finding of inconvenience for AI's witnesses. *See e.g. CPC Logistics*, 2013 U.S. Dist. LEXIS 113711 at *9-11 (denying motion to transfer where the plaintiff provided neither identities of the potentially "staggering" number of non-party witnesses, nor statements indicating anticipated testimony of such witnesses); *American Standard, Inc v. Bendix Corp*., 487 F.Supp. 254, 262–263 (W.D. Mo. 1980)) (where movant "merely makes a general allegation that witnesses will be necessary, without identifying those necessary witnesses and indicating what their testimony at trial will be, the motion for transfer based on convenience of witnesses will be denied").

Although AI has identified one specific out-of-District third-party witness (consultant Natalie Zensius (Page Decl. ¶ 7)), AI has certainly not suggested she will refuse to testify in Missouri or that her testimony via deposition would be inadequate. *See CPC Logistics*, 2013 U.S. Dist. LEXIS 113711 at *11 (the balance of the inconvenience of the witness did not weigh in favor of transfer where defendant made no showing that a particular witness will refuse to come to Missouri voluntarily or that the witness's testimony could not be adequately presented by deposition); *Maritz*, 2007 U.S. Dist. LEXIS 8678, at *12 (same).

Most disturbing, of course, is not what AI says, but what it does not say. In asserting that it has no connection to Missouri and that none of its witnesses are located in the forum (AI Brief at 1-2, 6; Page Decl. ¶ 8), AI fails in its duty of candor to this Court by saying nothing about the many years it existed here and not saying anything about at least six additional key witnesses it previously identified who still reside in or around Kansas City, Missouri and who were involved in creation and development of AI's marks and AI's products marketed under these marks. (See Section II.C. above). This includes the person who selected the name "Ascension" and was identified by AI in the TTAB proceeding as its principal witness.

Nor has AI been consistent in explaining where its documents are located. Although it now says all of its documents are in California (AI Brief at 3, 7; Page Decl. ¶ 5), in the TTAB proceeding, it said all of its documents were in the possession of its trial counsel at Polsinelli, who maintains an office in Denver and this District, but not California.[5] (Moskin Decl., Ex. D).

By contrast, Ascension has enumerated at least seven key witnesses located in this District and their topics of testimony. (*Supra Section II.C*). These Ascension employees, including most of its officers and directors, work in or around Ascension's St. Louis headquarters. (Ragone Decl. Ex. A.). *See, e.g.*, *Audi AG*, 341 F. Supp. at 751 (transfer motion denied based, in part, on Plaintiff's showing that witnesses located in Eastern District of Michigan would testify concerning plaintiff's use of its trademarks and its damages).

Furthermore, the documents and physical evidence relevant to Ascension's development and use of its trademarks in issue are located in this District. Ascension's Missouri-based evidence is critical to establish the likelihood of confusion that would give rise to infringement liability. Among the most critical factors in establishing likelihood of confusion in a trademark infringement case are the strength of the mark and the marketing channels in which the mark is

[5] The categories of documents identified in the possession of counsel included the following ten categories: (i) creation, adoption and use of the ASCENSION and ASCENSION INSURANCE, INC. marks; (ii) correspondence between the parties; (iii) AI's services offered under the ASCENSION and ASCENSION INSURANCE, INC. marks; (iv) marketing and promotion materials bearing the two marks; (v) website and other internet promotional materials; (vi) relevant accounting and tax records; (vii) customer data; (viii) trademark prosecution files; (ix) insurance licensing records, and (x) insurance industry publications.

used. *SquirtCo. v. Seven-Up Co.*, 628 F.2d 1086 (8th Cir. 1980).[6] The strength of a mark is based on both its distinctiveness and its recognition in the eyes of consumers, which can be measured by the trademark owner's historic marketing campaigns and advertising expenditures. To demonstrate the strength and recognition of its trademarks, Ascension requires access to crucial evidence located in this District. This includes sales and advertising records, financial data, historic marketing campaign information, industry analytics, and documents showing decades-long development of the business conducted under the mark. Likewise, the several witnesses Ascension may call on these topics are all in Missouri, beginning with many of its own employees, but *also* several nearby third parties formerly employed by AI. *See, e.g., Van Andel Inst.v. Thorne Research, Inc.*, 2012 WL 5511912, at *4 (W.D. Mich. Nov. 14, 2012) (convenience of witnesses factor weighed in favor of hearing trademark infringement case where testimony of third-party witnesses was essential to issue of alleged loss of reputation).

Notwithstanding modern electronic discovery practices, physical accessibility to sources of proof continues to be an important factor in the venue analysis. *See, e.g., Steelcase Inc. v. Smart Techs.*, 336 F. Supp. 714, 721 (W. D. Mich. 2004) ("The location of physical evidence, such as documents, is a factor to be considered in determining convenience."); *see also Signal*, 2014 U.S. Dist. LEXIS 139357, at *15. Accordingly, the ease of access to witnesses and sources of proof strongly favors this Court retaining jurisdiction.

D. Missouri Has A Greater Interest In Resolving This Dispute

Ascension created and developed its business and name in the State of Missouri, where Ascension was founded in 1999 and its predecessors previously resided. The state where the intellectual property owner is located typically has a greater interest in adjudicating an intellectual property dispute. *See Anheuser-Busch*, 176 F. Supp. 2d at 953 (acknowledging that

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[6] *Bebe Stores, Inc. v. May Dep't Stores Int'l*, 230 F. Supp. 2d 980, 992 (E.D. Mo. 2002) (Perry, J.) (evidence of plaintiff's large sales and sustained advertising campaigns were essential for establishing the strength of plaintiff's mark).

Missouri had a strong interest in providing a forum for a Missouri corporation to protect its intellectual property who claimed infringement of its trademark); *Int'l Oddities v. Scott Record*, No. 12-3934, 2013 U.S. Dist. LEXIS 103847, *17 (C.D. Cal. July 22, 2013) ("California has a strong interest in protecting the intellectual property"); *Momenta Pharms., Inc. v. Amphastar Pharms., Inc.*, 841 F. Supp. 2d 514, 521-522 (D. Mass. 2012) (same); *Netalog, Inc. v. Tekkeon, Inc.*, No. 05-980, 2007 U.S. Dist. LEXIS 10845, *11-12 (M.D.N.C. Feb. 15, 2007) (same).

Not only has Ascension created and developed its trademark rights in this State, so too has Defendant, which was founded in Missouri and headquartered in Kansas City until 2014. There can be little doubt that Missouri has the paramount interest in resolving this matter. AI, having failed even to address the facts about its recent (and possibly transient) relocation to California, cannot now contend otherwise.

E. Retaining Jurisdiction Will Not Cause Defendants Undue Hardship

Finally, mere conclusory allegations that AI will be inconvenienced do not tip the scales in favor of transferring venue, particularly given that AI is indeed a national company. *See, e.g.*, *B.E. Tech., LLC v. Groupon, Inc.*, 957 F. Supp. 2d 939, 949 (W.D. Tenn. 2013) (finding unpersuasive assertion that transfer of venue would result in financial burden where asserting company failed to show, with specificity, how expenses would be detrimental to the company).

There is no reason why the entire question of where this lawsuit is heard should hinge on one witness's possible travel burdens. *See, e.g.*, *Flagstar Bank, FSB v. Estrella*, No. 13-CV-13973, 2013 WL 6631545, at *3 (E.D. Mich. Dec. 17, 2013) (inconvenience of Defendant's witnesses having to travel from Massachusetts to Michigan was "not significant enough to overcome the preference for Plaintiff's choice of venue"); *Levy v. City of Rio Grande*, 2004 WL 2847273, at *3 (N.D. Tex. Dec. 9, 2004) ("inconvenience to witnesses did not require transfer where movant failed to explain why it could not effectively present testimony by videotaped deposition") (citation omitted); *Orix Credit Alliance, Inc. v. Mid-S. Materials Corp.*, 816 F. Supp. 230, 235 (S.D.N.Y. 1993) ("Although the defendants have alleged that all of their witnesses reside in Mississippi, they have not shown how they will be prejudiced by presenting the testimony of these witnesses through depositions."). The burden on a party seeking a transfer of venue is "heavy" and "requires the moving party to show that the balance of factors weighs *strongly* in favor of transfer." *Steelcase, Inc.*, 336 F. Supp. 2d at 719 (citations omitted) (emphasis added). Defendants simply have not met that burden here.

IV. CONCLUSION

For the foregoing reasons, Ascension respectfully requests that the Court deny Defendant's Motion to Transfer, together with such other and further relief as the Court may deem proper.

Dated: July 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2015 a true and complete copy of the foregoing **ASCENSION HEALTH ALLIANCE'S OPPOSITION TO MOTION TO TRANSFER VENUE** was served by operation of the Court's ECF filing system via electronic mail on all counsel of record.

/s/ Winthrop B. Reed, III